BRIEF IN SUPPORT OF PETITION.

(1) THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The phrase "adequate and full consideration in money or money's worth" has been and now is used in several different sections of the estate tax and gift tax laws[1] and the determination of whether adequate and full money consideration has been received frequently determines whether a particular transaction is subject to tax and the amount of the estate or gift tax due. The proper interpretation of the phrase is important to the administration of both the estate tax and the gift tax.

This court recently considered the meaning of said phrase in connection with gift taxes and held that since the gift tax is supplemental to the estate tax the two laws must be considered *in pari materia* and the phrase "adequate and full consideration in money or money's worth" must be given the same interpretation in both laws.

Commissioner v. Wemyss (1945), ... U. S. ....., 65 S. Ct. 652;

Merrill v. Fahs (1945), ... U. S. ....., 65 S. Ct. 655.

In the *Wemyss* case, supra, this court stated that "the section taxing as gifts transfers that are not

[1]Sections 302(c), 302(i), and 303(a) of the Revenue Act of 1926 (now Sections 811(c), 811(i) and 812(b) of the Internal Revenue Code); Section 503 of the Revenue Act of 1932 (now Section 1002 of the Internal Revenue Code).

made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate" and determined that mere detriment to the donee did not constitute adequate and full consideration in money or money's worth within the meaning of the law. Since the two laws are *in pari materia* and are to be given the same interpretation it would seem that the same purpose and test would be applicable in the interpretation of the corresponding provisions in the estate tax law.

In the present case the transfer by Virgil D. Giannini of his property interest to the Giannini Trust as his part of the transaction between him, his parents and his brother and sister did not reduce his estate but actually increased it. The unquestioned facts establish that the interest which he received under the trust had a fair market value substantially in excess of the fair market value of the property which he transferred. He transferred an interest in property to the trust which had a fair market value of $43,284.60 at the time of the transfer and a fair market value of $46,072.04 one year after his death and received an interest in the trust which had a fair market value substantially in excess of said amounts (R. 100) (approximately $70,000. (R. 71).) The situation was no different in substance than it would have been if his parents had given Virgil $70,000 in cash as their part of the transaction instead of transferring their interest in the property to the trust. These unquestioned facts clearly establish that the transaction did not reduce Virgil's estate and was not of the type which the statute was intended to tax.

The transfer in question in the present case was made by Virgil and whether or not the property transferred should be included in his estate for estate tax purposes depends upon whether he received an adequate and full consideration in money or money's worth within the meaning of the law. The Circuit Court of Appeals refused to attach any importance to the fact that as the result of the transaction, Virgil received a property interest which had a fair market value in excess of the value of the property which he transferred. The Circuit Court attached much more importance to the fact that the parents received no consideration in money or money's worth for the property which they transferred and that their transfer was therefore a gift within the meaning of Section 503 of the Revenue Act of 1932. The Circuit Court reasoned that since the transfer by the parents was a gift for gift tax purposes, it could not constitute consideration to Virgil for the transfer which he made.

The interpretation adopted by the Circuit Court is extremely technical and completely disregards the real purpose of the law and might well result in the inclusion in the estate of a decedent of not only property transferred in a transaction which comes within the scope of Section 811(c) of the Internal Revenue Code (formerly Section 302(c) of the Revenue Act of 1926) but also the inclusion of the entire consideration received for the transfer. For example, suppose A gave B $50,000 to transfer property having an equal value to a trust of which B was the beneficiary for life and C was the remainderman. If B died possessed

of the $50,000, under the decision of the Circuit Court herein both the property transferred and the $50,000 would be included in B's estate for estate tax purposes. The transfer to the trust would be included under Section 811(c) of the Internal Revenue Code since the $50,000 received would be a gift by A for gift tax purposes and according to the Circuit Court would not constitute consideration to B for the transfer.

Such interpretation not only finds no support in the wording, the purpose or the history of the law but results in an extremely inequitable tax and appears to be inconsistent with the principle applied by this court in *Commissioner v. Wemyss,* supra, and *Merrill v. Fahs,* supra.

Section 302(i) of the Revenue Act of 1926 contains no such qualification or limitation. Said section by its terms applies in any case in which a person who makes a transfer described in subdivisions (c), (d), and (f) of said Section 302 for which consideration in money or money's worth *is received,* but which is not a bona fide sale for an adequate and full consideration in money or money's worth. The law is concerned only with whether the person who made the transfer involved received consideration. There is no indication in the law or its history that it is in any way material that the payment of the consideration received may or may not have constituted a gift for gift tax purposes by the person from whom the consideration was received.

Section 302(i) of the Revenue Act of 1926, as amended, has been incorporated in the Internal Reve-

nue Code as Section 811(i). The proper interpretation of that section is important to the administration of the Federal Estate Tax. This court has never had occasion to pass upon the question here involved. Section 812(b) and Section 1002 of the Internal Revenue Code likewise contain similar wording which undoubtedly require a similar interpretation to that given to Section 811 (i). See *Commissioner v. Wemyss,* supra, and *Merrill v. Fahs,* supra.

It is respectfully submitted that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court.

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(2) THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS IN CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In addition to subdivisions (c) and (i) of Section 302 of the Revenue Act of 1926, Section 303(a) of said Act also contained the phrase "adequate and full consideration in money or money's worth" in limiting the claims, mortgages and indebtedness which were deductible for estate tax purposes. Such limitation on deductions was first inserted in the law by Section 303(a)(1) of the Revenue Act of 1924, when Congress added the requirement that claims must have been incurred for a "fair consideration in money or money's worth". The Committee Reports state that the purpose of the 1924 amendment was to impose the same limitation upon deductions as was imposed by Section 402(c) of the Revenue Act of 1921 (and 302(c) of the

Revenue Act of 1924) upon transfers in contemplation of or intended to take effect at or after death. H.R. Rep. No. 179, 69th Cong. 1st Sess. pp. 28, 66 (Cum. Bull. 1939-1, Part 2, p. 261). Sen. Rep. No. 398, 68th Cong. 1st Sess. p. 35 (Cum. Bull. 1939-1, Part 2, p. 290). See also *Taft v. Commissioner* (1938), 304 U. S. 351, 356. Paul, Federal Estate and Gift Taxation, Vol. I, p. 599. The Revenue Act of 1926 changed the limitation in Section 302(c) and 303(a) from "fair consideration" to "adequate and full consideration" and added Section 302(i) which also contained the phrase "adequate and full consideration in money or money's worth". (See Revenue Act of 1926, Sections 302(c), 302(i) and 303(a).)

The statutory history of the above sections of the estate tax law as well as the identical wording and close relationship of the sections shows quite clearly that Congress intended the phrase "adequate and full consideration" to have the same meaning and receive the same interpreation in each of the sections of the law in which it was used. See *Commissioner v. Wemyss,* supra, and *Merrill v. Fahs,* supra.

In several cases the Commissioner of Internal Revenue has disallowed the deduction for estate tax purposes of claims for unfulfilled pledges to charitable or educational institutions on the ground that the claims were not incurred for an adequate and full consideration in money or money's worth. The prevailing rule as established by the decisions is that where such pledges were made in consideration of similar pledges by other parties such other pledges constitute adequate

and full consideration in money or money's worth within the meaning of Section 303(a) of the Revenue Act of 1926.

Helvering v. Safe Deposit and Trust Co. of Baltimore (4 Cir. 1938), 95 F. 806;

Taft v. Commissioner (6 Cir. 1937), 92 F. (2d) 667.

See also:

Brown v. U. S. (Ct. Cls. 1941), 37 F. Supp. 444;

Paul, Federal Estate and Gift Taxation, Vol. 1, p. 605.

In each of the cases cited above the pledge which was held to constitute adequate and full consideration for the claim against the estate of the decedent was unquestionably a gift. While the courts did not discuss that feature of the cases the gift was so apparent that it could not have been overlooked and must have been considered unimportant by the courts. The fact that the donee was a charitable or educational institution and the gift was therefore deductible for gift tax purposes does not alter the fact that it was a gift. Under the reasoning of the Circuit Court of Appeals in the present case, the mere fact that the pledges by the other parties were gifts would prevent them from constituting consideration.

It is respectfully submitted that the conclusion of the Circuit Court of Appeals below that a gift cannot constitute consideration is in direct conflict with the decisions cited above in which it was held that a gift or pledge to make a gift constituted adequate and full consideration in money or money's worth for a similar

pledge by another and met the requirements of Section 303(a) of the Revenue Act of 1926.

It is respectfully submitted that this petition should be granted.

Dated, San Francisco, California,
June 18, 1945.

GEORGE H. KOSTER,
Counsel for Petitioner.

BAYLEY KOHLMEIER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, George H. Koster, counsel for petitioner, hereby certify that the petition for a writ of certiorari herein is well founded, is filed in good faith and is not interposed for delay.

Dated, San Francisco, California,
June 18, 1945.

GEORGE H. KOSTER,
Counsel for Petitioner.

(Appendix Follows.)